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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALEXANDRA SARIGIANIDES, Plaintiff and Respondent, v. TACOS MEXICO, INC., Defendant and Appellant.	B250193 (Consolidated with B255198) (Los Angeles County Super. Ct. No. BC453089)

APPEAL from a judgment of the Superior Court of Los Angeles County. Holly E. Kendig, Judge. Affirmed.

Copenbarger & Associates, Paul D. Copenbarger and Elaine B. Alston; John L. Dodd & Associates, John L. Dodd and Benjamin Ekenes, for Defendant and Appellant.

Law Office of Rosalinda V. Amash, Rosalinda V. Amash, for Plaintiff and Respondent.

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The trial court found that the tenant who rented a building equipped to operate a fast food restaurant breached its lease by vacating early, by removing most of the restaurant's kitchen fixtures, and by leaving the building in a state of disrepair. The tenant challenges this ruling and the court's subsequent award of damages and prejudgment interest on the grounds that the trial court erred in (1) precluding the tenant from calling two witnesses, (2) finding that the tenant had invoked the five-year extension of the underlying 10-year lease, (3) finding that the landlord was entitled to $350,453.45 in damages to the building and its fixtures, and (4) awarding prejudgment interest on those building and fixture-related damages. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL HISTORY

I. Facts

Because this appeal involves challenges to the sufficiency of the evidence supporting the trial court's findings, we recount the facts in the light most favorable to those findings and defer to the trial court's credibility findings. (*Santa Clara County Correctional Peace Officers Assn, Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1027.)

A. Underlying lease

Plaintiff Alexandra Sarigianides (Alexandra) and her son Aris (Aris) have been in the fast food restaurant business for years.[1] Alexandra owns the 1100 to 1200 square foot building at 5741 East Imperial Highway, in the city of South Gate; for decades, Alexandra and Aris have either operated a fast food restaurant from this location or rented it out to others to operate their own restaurant. Defendant Tacos Mexico, Inc. (TMI) for many years operated a chain of fast food restaurants and now licenses its brand name out to independent restaurateurs.

In 1998, Alexandra leased the East Imperial Highway building to TMI to operate a "fast food restaurant" for a 10-year period running from May 1, 1998 through April 30,

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[1] We use first names to avoid confusion; no disrespect is intended.

2008. Under the terms of the written lease, TMI was to accept the premises "as is." When TMI took possession in 1998, the building was a "fully functioning" restaurant in good condition, albeit with kitchen and dining fixtures that had been in use for a while. On a going-forward basis, TMI was obligated to "keep the [p]remises . . . in good order, condition and repair," including making any "restorations, replacements or renewals" at its "sole cost and expense." TMI was also to pay all property taxes. TMI agreed to "surrender the [p]remises" at the end of the lease term "with all of the improvements, parts and surfaces thereof clean and free of debris, and in good operating order, condition and state of repair, ordinary wear and tear excepted," and with "any damage occasioned by the installation, maintenance or removal of [its own] [t]rade [f]ixtures" repaired. The lease also gave TMI the option to extend the lease for up to an additional five years, which TMI could exercise by providing "a written notice" to Alexandra between three and nine months before the April 30, 2008 expiration of the underlying lease.

B. Exercise of option to extend the lease

In May 2007, Aris was running the day-to-day business for his mother. He received a call from Patty Sanchez (Sanchez), who was the daughter of TMI's founder and a TMI employee who had stated in a federal court proceeding that she was an authorized representative of TMI. Sanchez told Aris that TMI was going to sell its business to Carlos Solares (Solares), and that she wanted Aris's approval for TMI to sublet the East Imperial Highway restaurant to Solares for five years. Aris said he would approve the sublease only if TMI remained the primary tenant and guarantor. TMI agreed that it would need to exercise the option to extend the underlying lease by five years, and after an eventual reminder call from Aris, TMI faxed Aris a letter exercising the option in October or November of 2007. Coffee Bean & Tea Leaf expressed interest to Aris in leasing the East Imperial Highway location in 2008, but Aris turned away that potential opportunity because TMI had exercised its option.

C. TMI's abandonment of premises

In November 2010, Solares informed TMI that he was vacating the East Imperial Highway location by the end of that month, and TMI informed Aris it would

consequently be terminating the lease. TMI's final rent check was for November 2010. Solares nevertheless continued operating his business into December, and TMI never surrendered the keys; Aris had to hire a locksmith, and regained access in late December 2010.

What he found was a "mess." Sunlight streamed through a "gaping hole" in the ceiling and roof; water from a recent rainstorm pooled on the ground; one of the interior walls was missing; and debris and garbage littered the floor. The restaurant itself had been "gutted." Many of its fixtures—including the sink, one of its fryers, and the ice-making apparatus of the ice machine—had been ripped out and carried away, leaving exposed electrical wiring. Other fixtures—including the stainless steel shelving, the walk-in refrigerator, the booths, and one of the exhaust hoods—had been swapped with cheaper and less durable substitutes.

Aris hired a broker to lease the building. The broker found an auto title lender to lease the location 16 months later, but had to offer five months of free rent as an incentive.

II. Procedural History

Alexandra sued TMI for breach of contract, and sought (1) unpaid rent for the balance of the extended lease term, and (2) the cost of repairing the building and replacing the missing or downgraded fixtures. The case proceeded to a 10-day bench trial.

After considering objections to its tentative ruling, the trial court issued a 25-page final ruling in Alexandra's favor. More specifically, the court (1) concluded that TMI had breached the lease by vacating prior to the end of the five-year extension without paying rent and property taxes, (2) concluded that TMI had breached the lease's covenant to repair by not returning the building and its fixtures in the condition in which they were received in 1998, and (3) calculated damages of $81,698.10 in unpaid rent, $8,987.66 in unpaid property taxes, and $354,738.45 in costs to obtain entry, to repair the building, to make emergency repairs, to replace the fixtures, and to pay the portion of the broker's fee attributable to TMI's early departure.

The court entered judgment for Alexandra in the amount of $445,424.21. TMI filed a motion for new trial, a motion to vacate the judgment, a motion to set aside the ruling due to fraud, and a motion to disqualify the trial judge. All were denied. Alexandra sought costs, attorney's fees, and prejudgment interest. The trial court awarded costs, attorney's fees, and $101,951.96 in prejudgment interest—$18,367.94 as to the unpaid rent and property taxes from the dates they became due, and $83,485.02 as to the repair and restoration costs from the date Alexandra filed her complaint.

TMI separately appealed the judgment and the postjudgment orders. We consolidated the two appeals.

DISCUSSION

I. Order Precluding TMI From Calling Two Witnesses

TMI argues that it is entitled to a new trial because the trial court did not allow it to call Sanchez or Solares as witnesses in its case-in-chief.

A. Pertinent facts

Prior to the final status conference and pursuant to Los Angeles County Superior Court, Local Rules, rule 3.25(f)(1), Alexandra and TMI submitted a joint witness list that, for each party, listed which witnesses "will" testify and which "may" testify. Alexandra listed Sanchez and Solares as witnesses who "will" testify; they were not on TMI's list.

In its opening statement, TMI delineated its witnesses and their anticipated testimony; TMI made no mention of Sanchez or Solares. During its case-in-chief, Alexandra mentioned how she was unable to serve either Sanchez or Solares with subpoenas, and ultimately rested without calling either witness.

After Alexandra rested her case, TMI sought the court's permission to call Jose Venegas as a witness. The trial court refused to allow Venegas to testify because he was not on TMI's pretrial witness list TMI said nothing about Sanchez or Solares.

The next day, TMI announced its intention to call Sanchez and Solares as witnesses. TMI's counsel revealed that she had been in contact with Sanchez and Solares while Alexandra was presenting her case-in-chief, and had known how to contact Sanchez the whole time. Counsel further indicated that she decided to call Sanchez as an

impeachment witness after hearing Aris's testimony. After the trial court stated its initial inclination not to allow TMI to call either witness because they were not listed as actual or potential witnesses for TMI on the pretrial witness list, TMI's counsel stated she had intended to call both witnesses all along and had misunderstood the court's requirement that TMI separately list any witnesses already listed by Alexandra on the joint witness list.

The trial court ultimately ruled that TMI could not call Sanchez or Solares as witnesses for three reasons. First, TMI had violated Los Angeles County Superior Court, Local Rules, rule 3.25(f)(1)[2] by not listing either witness in its pretrial witness list, and did not establish "good cause" to excuse its noncompliance. Second, the court invoked its "inherent power to exercise reasonable control over litigation proceedings" to exclude Sanchez and Solares because TMI had engaged in "litigation gamesmanship" in an attempt to obtain a "strategic litigation advantage" by waiting until Alexandra rested her case without calling those seemingly unavailable witnesses before revealing that it had been in contact with them all along and seeking to call them. To allow TMI to call Sanchez or Solares, the trial court reasoned, would be unfair to Alexandra and potentially infringe upon her right to due process given that TMI had concealed its ability to reach these witnesses and its intention to call these witnesses until she had rested her case. Third, the proffered testimony of Sanchez and Solares—namely, that there was no sublease, that the East Imperial Highway location was in poor condition when handed over in 1998, and that the location was in good condition when vacated in 2010—was "cumulative" and "irrelevant."

B. Analysis

The propriety of the trial court's order precluding Sanchez and Solares from testifying rests in part on the scope of its authority to control proceedings, which is a question of law we review de novo (*In re Taylor* (2015) 60 Cal.4th 1019, 1035), in part

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[2] The trial court cited Los Angeles County Superior Court, Local Rules, rule 3.25(h)(1), which was subsequently recodified as rule 3.25(f)(1).

on the exercise of its discretion within that scope (*People v. Arias* (1996) 13 Cal.4th 92, 147-148), and in part on whether its discretionary call rests on factual findings supported by substantial evidence (*Rangel v. Graybar Electric Co.* (1977) 70 Cal.App.3d 943, 948 (*Rangel*)).

Trial judges possess an "'inherent power to control litigation before them'" and """to exercise reasonable control over all proceedings connected with pending litigation."""" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351, quoting *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *People v. Suff* (2014) 58 Cal.4th 1013, 1038 [same].) Although this power exists independently of any statute (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 635), its existence is acknowledged by statute (Code Civ. Proc., § 128, subd. (a)(5) ["Every court shall have the power . . . [t]o control in furtherance of justice, the conduct . . . of all . . . persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto"]), and must not be exercised in a manner that contravenes statutory law (*Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1144). A trial judge may use this inherent authority to prevent the surprise attendant from calling an eleventh-hour witness (*Castaline v. City of Los Angeles* (1975) 47 Cal.App.3d 580, 592), or to prevent "trial by ambush" and other "unfair results" stemming from "abus[ive]" litigation tactics (*People v. Bell* (2004) 118 Cal.App.4th 249, 256; *Peat v. Superior Court* (1988) 200 Cal.App.3d 272, 288, 290 (*Peat*)).

The trial court's finding that TMI engaged in "litigation gamesmanship" that unfairly surprised Alexandra falls squarely within the metes and bounds of this inherent authority, and is supported by substantial evidence. TMI did not list Sanchez or Solares in its potential witnesses list, did not discuss them as potential witnesses in its opening statement, and kept its contact with these witnesses secret in the face of Alexandra's reports that she could not locate these witnesses. Instead, TMI waited until Alexandra rested her case before announcing for the first time that it wished to call these witnesses. TMI's counsel then offered inconsistent reasons for not mentioning Sanchez sooner—initially, that she decided to call her in the midst of Aris's testimony and, later, that she

had intended to call her all along but misunderstood what the court wanted in its joint witness list.

TMI offers three arguments as to why the trial court's ruling was erroneous. First, TMI contends that the trial court lacked the authority to preclude its witnesses as a sanction for violating Los Angeles County Superior Court, Local Rules, rule 3.25. A trial court may not impose a sanction for a violation of local rules if (1) the sanction punishes the party for its attorney's error (Code Civ. Proc., § 575.2, subd. (b)), or (2) less severe sanctions would be effective (Gov. Code, § 68608, subd. (b)). (*Tliche v. Van Quathem* (1998) 66 Cal.App.4th 1054, 1061-1062; accord, *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 471, 475; see also *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1154 [court may not sanction party for violating courtroom-specific rules regarding a "curable defect"].) We need not decide whether the trial court transgressed these limits because the court's order in this case independently rests upon its inherent authority to control the proceedings before it. (*People v. Letner & Tobin* (2010) 50 Cal.4th 99, 145 ["On appeal we consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons* for reaching its decision"].)[3]

Second, TMI asserts that the trial court's ruling is an invalid exercise of its inherent authority, and offers several arguments. TMI argues that misconduct must be "willful" before it is sanctionable, citing *Rangel*, *supra*, 70 Cal.App.3d at pages 947-948, and *Thoren v. Johnson & Washer* (1972) 29 Cal.App.3d 270, 273. Even if we assume these cases dealing with discovery sanctions apply to trial misconduct (which they do not, as we explain next), the trial court's finding of "litigation gamesmanship" necessarily relies on a finding of willfulness and is, as noted above, supported by substantial evidence. TMI next posits that the trial court's sanction is inconsistent with a number of cases addressing sanctions for discovery violations, some of which require a showing that a lesser sanction be inadequate. (See *Midwife v. Bernal* (1988) 203 Cal.App.3d 57, 64-65

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[3] For the same reason, TMI's challenge to the trial court's finding that excluding Sanchez and Solares as witnesses was "cumulative" or "irrelevant" is of no moment.

[discovery sanction cannot "go[] beyond . . . a sanction which will accomplish the purpose of discovery"]; *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 305 [same]; *Kelly v. New Federal West Savings* (1996) 49 Cal.App.4th 659, 667 [same]; but see *Rail Services of America v. State Compensation Ins. Fund* (2003) 110 Cal.App.4th 323, 331-332 [dismissal of claim due to plaintiff's refusal to provide discovery is valid sanction].) However, the rules governing sanctions for *discovery* misconduct do not automatically apply to *trial* misconduct. (*Peat*, *supra*, 200 Cal.App.3d at p. 291 ["The evidence preclusion order is not a discovery sanction, and there is no reason lesser sanctions must first be tried when the trial court is faced with a clear problem which only preclusion can remedy"].) TMI relatedly contends that the trial court was required to grant a midtrial continuance to allow Alexandra the chance to depose the two witnesses TMI had just revealed it had been secretly consulting, but TMI never suggested this option to the trial court; further, it is a "lesser sanction" that the trial court was not obligated to employ first, especially in light of the substantial disruption a sufficiently long continuance would cause to the court's trial calendar.

Third, TMI contends that the trial court violated TMI's due process rights by placing efficiency over fairness and "arbitrarily cutting off the presentation of evidence," the sin condemned in *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294 (*Carlsson*). *Peat* rejected precisely the type of due process objection TMI now presses: "We cannot accept the notion that due process of law entitles a litigant to present certain evidence after it has compromised its opponent's ability to counter that evidence with . . . litigation abuse." (*Peat*, *supra*, 200 Cal.App.3d at p. 290.) Moreover, the trial court did not cut off TMI's case midstream, as was the case in *Carlsson*. (*Carlsson*, at p. 284.) To the contrary, the trial court set reasonable time limits, allowed the parties to exceed them twice over, and even ended up allowing TMI more time than Alexandra to present its case. The court's preclusion order stemmed from the game playing it observed, and was tailored specifically to negate any tactical advantage from it. This was neither arbitrary nor an abuse of discretion.

II. Finding That Option To Extend Lease Was Exercised

TMI next argues that the evidence does not support the trial court's finding that TMI exercised the option to extend the original 10-year lease by an additional five years—that is, through April 30, 2013.

Aris testified that Sanchez faxed him a letter exercising the option in October or November 2007. The trial court found Aris to be a "highly credible" witness. Because the credible testimony of a single witness constitutes substantial evidence (e.g., *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1229, 1237), the trial court's finding rests on substantial evidence.

TMI levels four challenges to this conclusion.

First, TMI argues that there was insufficient evidence that the option was ever exercised because two TMI employees—its current president and its then-bookkeeper—did not find a copy of the fax Aris testified about in TMI's files. However, a conflict in the evidence does not render it insubstantial. (See *People v. Hicks* (2014) 231 Cal.App.4th 275, 286 ["Conflicting evidence . . . does not cast doubt on the trial court's factual findings because we review factual findings for substantial evidence"].)

Second, TMI contends that the trial court erred in admitting Aris's oral testimony about the written letter exercising the option because the secondary evidence rule bars such testimony. As pertinent here, a trial court may allow the contents of a writing to be introduced through oral testimony (rather than the document itself) if (1) no "genuine dispute exists concerning [the] material terms of the writing" and introduction of the testimony would not be "unfair" (Evid. Code, § 1521, subd. (a)), (2) the writing has been lost or destroyed, or is otherwise unavailable (*id.*, § 1523, subds. (b) & (c); *People v. Hovarter* (2008) 44 Cal.4th 983, 1013 (*Hovarter*)), and (3) the proponent of the oral testimony either shows it has conducted a "bona fide and diligent" search for the missing writing or, if "a suspicion" hangs over the writing, shows it made a more "rigid inquiry" for the writing (*Dart Industries, Inc. v. Commercial Union Insurance Co.* (2002) 28 Cal.4th 1059, 1068-1069 (*Dart*)). These rules' general preference for admitting the writing itself is designed to counter "'the possibility for fraud and mistake in proof of the

contents of a writing . . . .'" (*Osswald v. Anderson* (1996) 49 Cal.App.4th 812, 818-819.) The trial court did not abuse its discretion, or violate that policy, in allowing Aris to testify regarding the lease extension. (*Hovarter*, at p. 1013 [abuse of discretion review].) Here, the dispute was not over the *content* of the fax, but rather its *existence*, so the core concern of the secondary evidence rule was not implicated. More to the point, Aris testified that he searched his records for the fax and was unable to find it due to destruction of a portion of his files by water damage to the location where they were kept.

Third, TMI asserts that, even if Aris's testimony was properly considered, there was still insufficient evidence that TMI strictly complied with the prerequisites for exercising the option because TMI did not make its request between three and nine months before the end of the original lease in May 2008. To be sure, "courts are strict in holding an *optionee* to exact compliance with the terms of the option" because the optionor is binding itself to the option in advance. (*Hayward Lumber & Investment Co. v. Construction Products Corp.* (1953) 117 Cal.App.2d 221, 229, italics added; *Palo Alto Town & Country Village, Inc. v. BBTC Co.* (1974) 11 Cal.3d 494, 498 [conditions for option's invocation must be "strictly followed"]; *Bekins Moving & Storage Co. v. Prudential Insurance Co.* (1985) 176 Cal.App.3d 245, 251 [same].) TMI's argument is factually inapt because Aris testified that TMI had sent a fax exercising the option in October or November 2007, which is within the window prescribed by the option. TMI's argument is also legally inapt because the strict compliance requirement is meant to protect the optionor (here, Alexandra), not meant to give the optionee (here, TMI) an escape hatch.

Lastly, TMI raises several legal bars to the validity of the option's exercise. Most prominently, TMI argues that the extension was invalid under the statute of frauds because it was oral. Among other things, the state of frauds requires contracts involving "the sale" of "an interest" in "real property" to be in writing. (Civ. Code, § 1624, subd. (a)(3).) Even if we overlook Aris's testimony that TMI sent him a fax (which is a writing that satisfies the statute of frauds), it is well settled that the *oral* exercise of a *written* option—which is what TMI says we have here—complies with the statute of

frauds. (*Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d 603, 609; *Keller v. Pacific Turf Club* (1961) 192 Cal.App.2d 189, 196; cf. *Hagenbuch v. Kosky* (1956) 142 Cal.App.2d 296, 300 [statute of frauds violated by *oral* extension of *oral* option].)[4] TMI next asserts that the oral invocation does not comply with the "equal dignities" rule that requires a principal's delegation of authority to an agent to enter into a contract be in writing if the contract falls under the statute of frauds. (Civ. Code, § 2309 ["An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing"]; *Estate of Stephens* (2002) 28 Cal.4th 665, 672.) Contrary to what TMI argues, the equal dignities rule is a rule of agency, and not one that requires the exercise of a written option also to be in writing. To the extent TMI is seeking to invalidate Sanchez's authority to exercise the option for lack of written evidence of that authority, its argument lacks merit in light of Sanchez's written submission to a federal court that she was TMI's agent. TMI lastly argues that the trial court erroneously inferred TMI's exercise of the option from (1) TMI's sublease with Solares, and/or (2) a wholly new and different oral lease TMI entered into with Aris. These arguments ignore the trial court's amply supported factual findings, and are for that reason without merit.

III. Damages Award For Breach of the Covenant To Repair

TMI argues that the trial court's award of damages for the costs to repair the East Imperial Highway building and to restore the restaurant fixtures was excessive.

Where, as here, the tenant has terminated a lease containing a covenant to repair, the landlord is entitled to recover "[t]he cost of restoring the premises." (*Iverson v. Spang Industries, Inc.* (1975) 45 Cal.App.3d 303, 308 (*Iverson*); *Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal.App.4th 1183, 1201 (*Avalon*).) The landlord is only entitled to the amount necessary to put the premises into the condition it was in "at the inception of the lease"; the landlord may not collect

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[4] Because the statute of frauds is satisfied, we need not address TMI's attack on the trial court's alternative ruling that TMI is estopped from asserting the statute of frauds.

amounts that would put the premises in a "better condition." (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1272; *Iverson*, at p. 310; *Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 565-566; *Haupt v. La Brea Heating & Air Conditioning Co.* (1955) 133 Cal.App.2d Supp. 784, 788-789.) Consistent with general principles of contract law, these rules define the measure of damages as the amount that "will compensate the [landlord] for all the detriment proximately caused" by the tenant's breach of the covenant to repair. (Civ. Code, § 3300; see also *id.*, § 1951.2, subd. (a)(4) [landlord's damages include "[a]ny other amount necessary to compensate the lessor for all the detriment proximately caused by the lessee's failure to perform his obligations under the lease"].)

In this case, the trial court's award of $350,453.45 in damages to conduct the major repairs to the building and replace the restaurant fixtures was based upon estimates Alexandra obtained from two contractors—one who priced out the cost to repair the building and another who priced out the cost of buying new fixtures to replace the ones TMI removed, damaged or swapped with lesser quality substitutes.

TMI raises five challenges to this award.

First, TMI argues that Alexandra is not entitled to any damages because the building was "all destroyed" when TMI took possession in 1998. However, the trial court found the two TMI employees who so testified to be "simply not credible" based on their "convoluted," "confusing" and "exaggerated" testimony.[5] As noted above, conflicting evidence does not render Alexandra's evidence insubstantial; conflicting testimony rejected as incredible has even less impact.

Second, TMI contends that the trial court's damages award violates Civil Code section 3358 and is otherwise excessive because it is based on the cost of a code-compliant building and *new* restaurant fixtures, not the older fixtures present in the restaurant when TMI took possession in 1998. (Civ. Code, § 3358 ["Except as expressly

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5 TMI's contention that the trial court wrongly declined to consider purportedly expert testimony from one of these two witnesses is, in light of the court's credibility finding, of no consequence.

provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides"].) TMI is correct that, in 1998, the fixtures in the restaurant were in "good condition" but not new, and the building was (obviously) not at that time compliant with 2013 building codes. With respect to incorporating the cost to make the restaurant compliant with 2013 building codes, Aris testified that a 90-day gap in continuous operations forfeits a restaurant's ability to "grandfather" out of having to comply with current codes. TMI argues that Aris was not qualified to offer this opinion, but any error was harmless because TMI's own witness acknowledged this rule as well. TMI further argues that a tenant is only responsible for the costs of complying with current codes when the tenant alters its using of a building, citing *Wolfen v. Clinical Data, Inc.* (1993) 16 Cal.App.4th 171, 180, and *Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666, 672-673. Although these cases allow code compliance related costs in that context, they did not confront the issue in this case—namely, whether a gap in use also entitles the landlord to such damages. Because the trial court had before it substantial evidence that TMI's destruction of Alexandra's building and its fixtures caused the interruption in operations, the need for code-compliance upgrades—and hence the costs of those upgrades—was proximately caused by TMI's conduct and is a proper component of damages. With respect to using new fixtures to calculate replacement cost, Aris testified that he was unaware of any market for used fixtures. The TMI witness who testified there was a used-fixture market also inconsistently testified that most fixtures had a useful life of four to ten years and could not be used (or sold) thereafter; the trial court also found his testimony not credible on this very point. In light of this evidence, the trial court did not err in calculating damages using the only available market for fixtures—the market for new ones.

Third, TMI posits that Alexandra is not entitled to damages for replacement fixtures because she has leased the building to an auto title lender and has no present intention to spend the damages award restoring the building to a restaurant use. However, a landlord may recover full repair and replacement damages for breach of a

covenant to repair even if it does not use those damages to fix the building; the landlord is still harmed by the breach. (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 431-433.) Indeed, Alexandra rented the building to an auto title lender because the damages TMI caused made it unattractive to restaurateurs, and Alexandra opted to rent to a non-restaurateur to mitigate damages, even though doing so robbed the building of its "highest and best use."

Fourth, TMI argues that the trial court's damages award is not based on the diminution of value in the parcel as a whole and exceeds the amount of rent Alexandra would have received had TMI remained until the end of the extended lease period. These arguments lack merit. Diminution in value of the premises is an alternative measure of damages for the breach of a covenant to repair, and is not the measure applied in California. (*Iverson*, *supra*, 45 Cal.App.3d at p. 308; *Avalon*, *supra*, 192 Cal.App.4th at pp. 1201-1202.) Moreover, TMI's comparison of the damages from breach of the covenant to repair and the breach of the covenant to pay rent is unhelpful; they are separate covenants causing separate damages. That one award is greater than the other sheds no light whatsoever on whether the greater award is excessive.

Lastly, TMI asserts that Alexandra never produced a written inventory of the fixtures in the building in 1998, thereby precluding the trial court's damages award for replacement fixtures from being "clearly ascertainable" as required by Civil Code section 3301. (Civ. Code, § 3301 ["No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin"].) Even without a written inventory, the trial court heard testimony from Aris and TMI's witnesses as to the specific fixtures in the East Imperial Highway building in 1998 and in 2010, as well as their operational status. Using this testimony, the trial court parsed out which fixtures should be covered, and opted not to award damages for a second fryer. Given the granularity of this testimony and the court's analysis, the damages the court awarded were "reasonably ascertainable" even without a written inventory.

IV. Award of Prejudgment Interest

TMI attacks the trial court's award of $83,485.02 in prejudgment interest on the damages arising from the cost to repair the building and replace the fixtures, starting from the date Alexandra filed her complaint.

Although interest on a judgment accrues from the date judgment is entered, a prevailing party can also obtain *pre*judgment interest in two circumstances relevant to this case: (1) the prevailing party is *entitled* to prejudgment interest as to any damages that are "certain, or capable of being made certain by calculation," starting from the day the damages were incurred (Civ. Code, § 3287, subd. (a)); and (2) the prevailing party may ask the court to exercise its discretion by awarding prejudgment interest as to any unliquidated damages arising from a breach of contract, starting no earlier than the date on which that party filed its pleading for affirmative relief (*id.*, § 3287, subd. (b)). Because damages awarded for breach of a covenant to repair are unliquidated until determined at trial (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 398; accord, *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 751-753 (*Faigin*)), they may be awarded only under Civil Code section 3287, subdivision (b). Because this is a discretionary call, we review the trial court's award of such damages for an abuse of discretion, asking whether the ruling has a "reasonable basis." (*Faigin*, at p. 752.)

In evaluating the exercise of this discretion, we are guided by "the purpose of prejudgment interest," which is "to compensate [the] plaintiff for [the] loss of his or her property." (*Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 198.) The trial court is to "determine whether an award of prejudgment interest is appropriate in light of the particular facts and circumstances in the case," and "to balance the concern for fairness to the debtor against the concern for full compensation to the wronged party." (*Faigin*, *supra*, 211 Cal.App.4th at pp. 751-752.)

TMI raises two sets of challenges to the trial court's discretionary award of prejudgment interest. First, TMI asserts that the trial court did not explain its discretionary balancing. However, express findings are not required. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148-1149.) Rather, we are to "review the trial court's

exercise of discretion based on implied findings that are supported by substantial evidence" (*ibid.*) and must "'presume that the court . . . acted within its discretion unless [TMI] affirmatively shows otherwise. [Citations].'" (*Faigin, supra*, 211 Cal.App.4th at p. 752.) In this case, the trial court could have reasonably concluded that prejudgment interest was warranted after determining that the damaged building and fixtures were the product of TMI's non-negligent acts and resulted in the lost opportunity—during the two years litigation was pending—to restore the property to restaurant use and to regain the highest long-term value that comes from that use.

Second, TMI offers several reasons why this exercise of discretion was faulty. TMI assembles, from a range of California and federal cases, 12 factors relevant to awarding prejudgment interest, and faults the trial court for not applying these factors. But Civil Code section 3287, subdivision (b) specifies no particular test, and, as noted above, we are able to infer a reasonable basis for the trial court's award. TMI argues that prejudgment interest on the repair demand award is a "windfall" because Alexandra has not yet rebuilt the building as a restaurant, but, as noted above, the damages Alexandra suffered by virtue of the breach of the covenant to repair exist no matter how Alexandra ultimately uses the damages award. Lastly, TMI contends that Aris's delay in obtaining the estimates for the repair and replacement costs indicates a lack of urgency inconsistent with an award of prejudgment interest. Even if relevant to the exercise of the court's discretion, it does not invalidate the court's otherwise reasonable discretionary decision.

DISPOSITION

The judgment is affirmed. Alexandra is entitled to her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ